

54322

DEPT. OF TRANSPORTATION
DOCKETS

99 APR 16 PM 4:01

P O S I T I O N P A P E R

TO: Members of the Gas Processors Association

FROM: Gas Processors Association

RE: Applicability of Natural Gas Pipeline Safety Act of 1968 and Hazardous Liquid Pipeline Safety Act of 1979 to gas processing plants.

DATE: May 2, 1989

This memorandum contains a limited analysis of the Natural Gas Pipeline Safety Act of 1968, as amended, 49 U.S.C. § 1671, et seq. ("NGPSA") and the Hazardous Liquid Pipeline Safety Act of 1979, as amended, 49 U.S.C. § 2001, et seq. ("HLPESA"), for the purpose of supporting the proposition that the U.S. Department of Transportation ("DOT") has no authority under either Act to issue regulations affecting gas processing plants. For purposes of this memorandum we define gas processing plants as those facilities used primarily for the extraction or removal of liquid or liquefiable hydrocarbons from natural gas, typically producer-owned, and normally located at the end of gathering lines. The activity performed at these plants is the culmination of production and gathering operations, and seeks to maximize the producer's economic interest in the natural gas. Transmission pipelines take delivery of the residue gas at the outlet of these plants.

As noted in page 10 of this memorandum, the DOT, during Congressional hearings before the passage of the HLPESA, was asked whether the DOT's jurisdiction under the NGPSA reached processing plants. The DOT's response to such inquiry was that the NGPSA "does not reach processing plants." 1979 Congressional Information Service, 261-61 p. 45.

As shown below, this statement has ample support from the letter and legislative history of the NGPSA. As for the HLPESA, the letter and legislative history thereof also support the proposition that gas processing plants are not subject thereto.

I. Principles of Statutory Construction

The starting point in every case involving construction of a statute is the language itself. Landreth Timber Co. v. Landreth, 471 U.S. 681, 105 S.Ct. 2297 (1985). The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a

RSPA-98-4868-45

result demonstrably at odds with the intention of its drafters." Griffin-v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 102 S.Ct. 3245, 3250 (1982). The legislative purpose is expressed by the ordinary meaning of the words used, Richards v. United States, 369 U.S. 1, 82 S.Ct. 585 (1962), and only when the language does not express Congress' intent with sufficient precision is reference to legislative history necessary. United States v. Ron Pair Enterprises, Inc., _____ U.S. _____, 109 S.Ct. 1026 (1989).

II. Provisions of Natural Gas Pipeline Safety Act

The NGPSA directs the DOT to establish, by regulation, minimum Federal safety standards for (i) the transportation of gas and (ii) pipeline facilities. Such standards may apply to the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities. 49 U.S.C. § 1672(a)(1).

The NGPSA defines "transportation of **gas**" as:

"**the** gathering, transmission or distribution of gas by pipeline or its storage in interstate or foreign commerce;" except that it shall not apply to the gathering of gas in rural areas. (emphasis added). 49 U.S.C. **§ 1671(3)**.

The NGPSA defines "pipeline facilities" as:

"(including), without limitation, new and existing pipe rights-of-way and any equipment facility, or building used in the transportation of gas or the treatment of gas during the course of transportation . . . " 49 U.S.C. **§ 1671(4)**.

The NGPSA does not include processing of natural gas within the definition of "transportation of gas." The NGPSA defines transportation of gas as the gathering, transmission or distribution of gas by pipeline. It does not reference gas processing. DOT's definition of "pipeline" is "**all** parts of those physical facilities through which **gas** moves in transportation, including pipe, valves, and other appurtenance attached to pipe, compressor units, metering stations, regulator stations, delivery stations, holders, and fabricated assemblies." 49 CFR § 192.3. Gas processing plants, as we have defined them for purposes of this memorandum, are not included within this definition of "pipeline." While it may be argued

that a gas processing plant located directly on a transmission line could fall within the definition of a "pipeline", this memorandum covers only those processing plants as defined previously in this memorandum.

On the other hand, there is a question as to whether gas processing plant facilities are included within the definition of "pipeline facilities." As noted above, pipeline facilities are defined in the NGPSA as "pipe rights-of-way and any equipment facility, or building used in ... the treatment of gas during the course of transportation." Neither the NGPSA nor the DOT regulations issued thereunder contain a definition of the phrase "treatment of gas during the course of transportation." Absent a statutory definition of this phrase, we will analyze the language of the statute itself based on the statutory **construction** rules set forth above. Our review of judicial decisions concerning the NGPSA has revealed no instance in which this question has been specifically addressed.

The term "treatment of gas" appears to have a commonly accepted meaning. For example, the Federal Energy Regulatory Commission ("**FERC**") has stated the following:

"The Commission recognizes, as Exxon points out, distinctions between gas treating and **gas** processing. The Commission also recognizes that 'gas conditioning' is often acknowledged as a distinct operation, and that sometimes the terms 'gas treating' and 'gas conditioning' are used interchangeably. As those terms are generally used, 'gas treating' refers to the removal of constituents (e.g., carbon dioxide, hydrogen sulfide, water, etc.) which interfere with safe and efficient handling and transportation of natural gas. 'Gas conditioning' often refers to those operations (e.g., hydrocarbon dew point control, water dew point control, temperature, etc.) dictated by the design specifications of a particular pipeline system. 'Gas processing' usually refers to the removal of constituents from the gas stream (e.g., liquefiable hydrocarbons, helium, etc.) which have a higher economic value when isolated and sold separately than when left intact in the gas stream."

15 FERC ¶ 61,235 (1981).

Additionally, the Gas Processors Association, in its published Glossary of Definition of Words and Terms Used in the Gas Processing Industry, GPA Publication 1167.83 (Rev. 1983), **similarly** defines "treating" as "[t]he process of removing objectionable substances from gases and liquids." *Id.* at 19. Also in accord with the **FERC's** understanding of gas processing, the Glossary defines a gas processing plant as a "**plant** which processes natural gas for recovery of natural gas liquids and sometimes other substances such as sulfur." *Id.* at 10.

Consistent with industry usage, therefore, since the terms "treatment of **gas**" would not be so broad as to include "**gas** processing", we do not believe that gas processing plant facilities are included within the definition of pipeline facilities in the NGPSA.

Finally, a gas processing plant, as defined earlier in this memorandum, is not a facility used for the treatment of gas during the course of transportation. "Transportation" as defined in the NGPSA is the gathering, transmission or distribution of gas by pipeline. Since, as defined, a gas processing plant is functionally unrelated to gathering, transmission or distribution, it must be excluded from the definition of "pipeline facility."

III. Provisions of Hazardous Liquid Pipeline Safety Act

The HLPESA also directs the DOT to establish, by regulation, minimum Federal safety standards for (i) the transportation of hazardous liquids and (ii) pipeline facilities. 49 U.S.C. **§ 2002(a)**. "Hazardous liquids" expressly includes petroleum or any petroleum product. 49 U.S.C. **§ 2001(2)**. The standards may apply to the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities. 49 U.S.C. **§ 2002(c)**.

The HLPESA defines "transportation of hazardous liquids" as:

"... the movement of hazardous liquids by pipeline, or their storage incidental to such movement, in or affecting interstate or foreign commerce; except that it shall not include any such movement through gathering **lines** in rural locations or onshore **production**, refining, or manufacturing facilities or storage or in-plant piping systems associated with any of such facilities" 49 U.S.C. **§ 2001(3)**.

The HLPESA defines "pipeline facilities" as:

" ... without limitation, new and existing **pipe**, rights-of-way, and **any** equipment, facility, or building used or intended for use in the transportation of hazardous liquids" 49 U.S.C. § 2001(4).

Gas Processing plant facilities are not covered by the HLPESA because the only facilities subject thereto are "pipeline facilities" and, as defined, such pipeline facilities are only those used or intended to be used in the transportation of hazardous liquids. Moreover, the definition of "transportation of hazardous liquids" expressly excludes the movement of liquids through onshore manufacturing facilities or in-plant piping systems associated with such facilities. There can be little doubt that the plain meaning of the term manufacturing facilities in the HLPESA includes gas processing plants.

In order to gain further insight as to the meaning of the provisions contained in the NGPSA and HLPESA, and not because such provisions may be unclear or ambiguous, we offer below a brief review of the legislative history of both Acts.

IV. Legislative History of the Natural Gas Pipeline Safety Act

The NGPSA was originally enacted in 1968 by Public Law No. **90-481**, and was included in the Senate Bill S. 1166, 90th Cong., 1st Sess. The original provisions in the bill were drafted by the DOT soon after the DOT's creation under President Johnson in 1967.

The tremendous increase in the use of natural gas and the concurrent increase in the number of miles of gas lines, viewed in light of the growth of the population, were thought by Congress to immeasurably increase the need to consider the industry's safety record and standards. The first Secretary of Transportation, Mr. Alan S. Boyd, presented to Senate and House Committees the need for the legislation, emphasizing that the Industry Code B-31.8, created by the American Society of Mechanical Engineers and the U.S.A. Standards Institute, did not provide the safety standards essential for gas pipeline systems.

The bill, as originally drafted, provided that the DOT was being authorized to issue regulations concerning inspection, testing, construction, extension, operation, replacement, maintenance of existing and proposed gas lines, and "appurtenant facilities." When a member of the Senate Commerce Committee asked Secretary Boyd during the hearings on S. 1166 what was meant by the term "appurtenant facilities," Secretary Boyd stated that **"the** term appurtenant facilities, used in § 3 of the Senate

Bill is intended to authorize the Secretary to promulgate safety standards covering those components of a pipeline system which share with the pipeline itself the potential for harm against which the public should be protected. The term would include, without limitation, storage facilities (pipe type or bottle type, including those for liquid natural **gas**, and underground facilities, including vaults); pits for valves, pressure relieving, pressure limiting or pressure regulation stations; compressor stations; main line valves (automatic); measuring and pressure regulating equipment; and gas purification facilities (dehydration, diesel fortification, and other facilities to assure the quality of **gas**). " 1968 Congressional Information Service, S. 1807-7, p. 21.

Though agency statements in this context concerning a law they are in charge of administering are not binding, the above quoted statement is the best evidence of the original intent concerning the scope of the bill for what later became the **NGPSA**, as to the facilities covered. All evidence subsequently **presented** to the Senate Commerce Committee concerned the safety of natural gas pipelines with separate attention being given to gathering lines, transmission lines and distribution lines in light of their particular geographic location, safety record, and risk created to the population.

As finally reported by the Senate Commerce Committee, however, S. 1166 did not refer to "natural gas pipelines and appurtenant facilities" as in the original draft, but to "**pipeline** facilities," defined as today in the NGPSA. S. Rep. No. 733, Cong. Record, Vol. 113, p. 32040. There is no indication from the Committee hearings before approval of the bill or from Senate floor debates before its passage of what prompted or was meant by the change of language.

Once it came before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign **Commerce**, S. 1166 was the subject of much discussion and revisions, but the relevant part of the definition of "pipeline facilities" was left untouched. On three occasions this Subcommittee received requests to delete from the definitions section of the bill the reference to treatment facilities. The first was from Mr. C.W. Miller, President of the Natural Gas Processors Association, who requested that the phrase "treatment of gas" be deleted from the bill because it could produce ambiguity. Mr. Miller stated that the bill was intended to cover drips, odorization facilities and similar integral parts of gas transportation, and that the phrase "treatment of **gas**" referred to could be construed as including processing plants, sulphur recovery plants, refineries, field separators and any other facility through which gas might flow, a result appearing to be

outside the intent of the bill. 1968 Congressional Information Service, H. 2308-8, p. 255. The second occasion was in a letter dated February 28, 1968, from Rep. Robert V. Denney to the Chairman of the House Subcommittee where Rep. Denney stated that "treatment" could be extended to facilities not intended to be covered by the bill. 1968 Congressional Information Service, H. 2308-8, p. 330. The third occasion was in Texas Rep. Robert Price's written recommendations to the House Subcommittee dated March 8, 1968, to the effect that the phrase "**or** the treatment of **gas**" be deleted from the bill. 1968 Congressional Service, H. 2308-8, p. 103. Because no member of the House Subcommittee made any statements on record concerning any of the three requests, there is nothing to suggest that Congress actually intended to use the concept of treatment facilities with a meaning broader than that which can be understood by taking into consideration the plain meaning of the words used in the text of the statute.

In fact, it may be that Congress understood the limited-meaning of treatment facilities because such phrase and that of "plant facilities" were used separately during the drafting of the NGPSA. The term "treatment facilities" was used in a letter by Secretary Boyd dated March 19, 1968, to the Chairman of the House Subcommittee wherein Secretary Boyd made it clear that the treatment of gas and the transportation of gas were considered as two separate and independent concepts. 1968 Congressional Service, H. 2308-8, p. 335. In a letter also dated March 19, 1968, to the Chairman of the House Subcommittee, Secretary Boyd used the term "**plant** facilities" when he said that "[I]t would not be our intention to set standards for plant facilities, as a rule, particularly where local health and safety provisions guarantee the safety of the employees." 1968 Congressional Information Service, H. 2308-8, p. 35. The drafters of NGPSA, therefore, implied that there is a distinction when they used the terms "treatment facilities" and "plant facilities" separately.

The NGPSA was passed because Congress perceived a need for Federal regulation of the transportation of gas by pipeline in order to protect the safety of the general public. The **original** intent behind S. 1166, from the discussions regarding the particular terminology to express that intent, was to cover gas pipelines and those components of a gas pipeline system which share with the pipeline itself the potential for harm against which the public should be protected.

In line with the stated purposes, Congressional Committees heard and considered evidence about the adequacy of the pipeline industry's self-regulation and its safety records. There was ample evidence about the loss of lives and damage to property caused by the explosion or rupture of gas transmission and distribution lines. Congress provided for the safety of gas

pipelines after having been shown the need for it based on the risk created by gas pipelines. We think it is of particular significance that Congressional Committees were not offered, nor did they inquire about, evidence concerning the safety record of gas processing plants. Floor debates also do not show a single instance in which the express intention was to regulate gas processing facilities. For this reason, a literal reading of the NGPSA with the effect of excluding therefrom gas processing plants is not demonstrably at odds with the intent of Congress.

After first enacted, the NGPSA has been amended three times, in 1976 (Pub. L. **94-477**), 1979 (Pub. L. 96-129) and 1986 (Pub. L. 99-516). Congressional reports leading up to these amendments show that not once was Congress' attention directed to gas processing plants or indicate in any way that Congress intended to include gas processing plants within the provisions of the NGPSA.

A. Legislative History of the Hazardous Liquid Pipeline Safety Act:

The HLPESA was originally enacted in 1979 by Public Law No. **96-129** (Title II), and was included in the Senate Bill S. 411, 96th Cong., 1st Sess. The original provisions of this bill were also drafted by the DOT and same contained two titles. Title I was to amend the NGPSA to provide for LNG facilities, and Title II was to propose a new law, HLPESA, for the safety regulation of hazardous liquid pipeline transportation.

Congress saw the need to provide for safety regulation of the transportation of hazardous liquids by pipeline after considering the inadequacies of the Transportation of Explosives Act of **1908**, until then DOT's only statutory basis from which to regulate the transportation of these liquids by pipeline, and becoming aware of the increasing risks to public safety due to the growing use of this mode of transportation. Senate Report No. **96-182**, 1979 U.S. Code Cong. & Admin. News 1971, et seq.

In his testimony before the Senate Committee on Commerce, Science and Transportation, Secretary of Transportation **Brock Adams** stated that "[w]e are proposing in Title II that hazardous liquid operations be treated as under the gas pipeline statute (NGPSA), which we believe is working well." 1979 Congressional Information Service S. 261-61, p. 5. "We are requesting in Title II that we be given the powers that we have under the Gas Pipeline Act We would regulate hazardous liquids,, like propane, within the same administrative and legal framework as we do with the present gas pipelines." *Id.*, p. 8. Sec. Adams labeled Title II as "new and comprehensive **legislation** for **the** safety regulation of hazardous liquid pipeline transportation." *Id.*, p. 22.

May 2, 1989
Page 9

The original draft of the HLPSEA was indeed patterned very **closely** after the NGPSA. Transportation of hazardous liquids was defined as "the movement of hazardous liquid by pipeline or its storage incidental to such movement in or affecting interstate or foreign commerce," 1979 Congressional Information Service S. 261-61, p. 68, and pipeline facilities was defined as "any new or existing pipe, rights-of-way, and equipment, facilities, or buildings used or intended to be used in the transportation of hazardous liquids or the **treatment of hazardous liquids during the course of transportation**Id.", p. 68.

Mr. Paul G. **Doran**, President of Texas Eastern Products Pipeline Co., testified before the Senate Commerce Committee on behalf of the American Petroleum Institute and the Association of Oil Pipelines, and objected to the above quoted definition of transportation of hazardous liquids "because it could include in-plant piping systems used in production, refining and marketing functions, where the DOT has neither expertise nor any legitimate role." 1979 Congressional Information Service, S. 261-61 p. 122. Further,

Mr. **Doran**: "I think the other definitions needing to be addressed are the facilities to be covered and the definition of facilities.

Question: Just in short . . .

Mr. **Doran**: It is all too encompassing. We look at it now as covering production, manufacturing and marketing as well as transportation."

1979 Congressional Information Service, S. 261-61 p. 129.

The Committee heeded this and other similar requests. As stated in the Senate Report: " . . . the Committee modified this definition [transportation of hazardous liquids] by adding 'except that it shall not include any such movement through gathering lines in rural locations or onshore **production**, refining, or manufacturing facilities or storage or in-plant piping systems associated with any of those facilities.' On the basis of discussions with the Department of Transportation and the affected industry, the Committee found that such an exemption was appropriate because such lines present insufficient risk to life and property to require regulation." S. Rep. No. **96-182**, 1979 U.S. Code Cong. & Admin. News p. 1988.

Further, the Committee also dropped the reference to treatment of hazardous liquids from the original definition of pipeline facilities because "[t]he original definition was drafted to parallel the Natural Gas Pipeline Safety Act, but industry representatives pointed out that the processes used for liquids transported by pipeline make this portion of the definition inappropriate for Title II." S. Rep. No. 96-182, 1979 U.S. Code Cong. & Admin. News p. 1988.

Finally, a question in a written questionnaire submitted by the Senate Commerce Committee to the DOT received an important answer:

"Question 51: Does the Secretary's jurisdiction under the Natural Gas Pipeline Safety Act reach processing plants? An example would be the proposed plant for processing Prudoe Bay Gas before it enters the proposed pipeline. Could the proposed 'Hazardous Liquid Pipeline Safety Act of 1979' (Title II of S. 411) be used to regulate the safety of refineries?

Fully explain your responses to the above questions.

Answer: The Secretary's jurisdiction under the NGPSA, even as it is amended by S. 411, does not reach processing plants, such as the plant that would process Prudoe Bay gas. The extent of DOT authority under the NGPSA essentially begins as set forth in the definition of 'gathering line' in Part 192, that **is, a pipeline - transporting gas from a current 'production facility.'** The term 'production facility' is used in the definition of 'gathering line' as a beginning point for gathering lines, in order to differentiate between gas in production and gas in transportation. This differentiation is necessary because the Federal safety standards in Part 192 **apply** only to the transportation of gas. The standards do not apply to processes of production, such as processing plants, or pipelines used to produce gas before the gas is introduced into transportation. While the NGPSA does address the treatment of gas, to be

covered by the Act such treatment must take place in the course of the transportation of gas.

Title II of S. 411 was not intended to extend to the safety regulation of refineries. Like the NGPSA, Title II covers the transportation of hazardous liquid and the treatment of hazardous liquid in the course of transportation.

The knowledge and expertise necessary to address safety problem in refineries is dissimilar to that necessary for addressing safety problems in pipeline transportation. It should be noted however, the OSHA has extensive occupational safety related requirements for refineries which go a long way to assuring the safe operation of such refineries."

19'79 Congressional Information Service, 261-61 p. 45.

B. Conclusions

The NGPSA and HLPSCA were enacted because Congress became aware of the risk to public safety created by the transportation of **gas** and hazardous liquids by pipeline. Congress acted when it saw the need to do so after considering evidence available from multiple sources. The legislative history of both Acts shows Congress' disposition not to provide for regulations when same are not needed or would be impractical. For example, under the NGPSA, Congress excluded rural gathering lines because of their excellent safety record, but included transmission and distribution lines because the risk they create to the public was abundantly shown. There is not a single instance where demonstrated risk areas went not provided for. **By** the same token, Congress cannot be held to have intended to regulate facilities for which no need for regulation was shown. This is the case of gas processing plants.

The legislative history of the HLPSCA is even more illustrative because Congress expressly reacted to suggestions that said Act could be read to apply to facilities used for activities other than transportation, thus clarifying that production, manufacturing and refining facilities are excluded. Additionally, since transportation in the HLPSCA was being defined generically as "movement by pipeline" rather than functionally (gathering, transmission or distribution) as in the NGPSA, it was

May 2, 1989
Page 12

suggested that such definition could be read to include in-plant piping **systems**. As quoted above from the Senate Report, these were then unequivocally excluded "because such lines present insufficient risk to life and property to require regulation."

Because **gas** processing plants are essentially manufacturing facilities never intended by Congress to have been included under the NGPSA and the HLPSA and, further, because **in-**plant piping systems have expressly been found by Congress to not require regulation, the DOT has no statutory authority under the NGPSA or the HLPSA to regulate gas processing plants.